

**OFFICIAL GAZETTE of the  
UNITED STATES PATENT AND TRADEMARK OFFICE**  
April 21, 1987 Volume 1077 Number 3

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April 21, 1987

Animals - Patentability

A decision by the Board of Patent Appeals and Interferences in *Ex parte Allan*, \_\_\_ USPQ \_\_\_ (Bd. App. & Int. April 3, 1987), held that claimed polyploid oysters are nonnaturally occurring manufactures or compositions of matter within the meaning of 35 U.S.C. 101. The Board relied upon the opinion of the Supreme Court in *Diamond v. Chakrabarty*, 447 U.S. 303, 208 USPQ 189 (1980) as it had done in *Ex parte Hibbard*, 227 USPQ 443 (Bd. App. & Int., 1985), as controlling authority that Congress intended statutory subject matter to "include anything under the sun that is made by man." The Patent and Trademark Office now considers nonnaturally occurring non-human multicellular living organisms, including animals, to be patentable subject matter within the scope of 35 U.S.C. 101.

The Board's decision does not affect the principle and practice that products found in nature will not be considered to be patentable subject matter under 35 U.S.C. 101 and/or 102. An article of manufacture or composition of matter occurring in nature will not be considered patentable unless given a new form, quality, properties or combination not present in the original article existing in nature in accordance with existing law. See e.g., *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 78 USPQ 280 (1948); *American Fruit Growers v. Broderick*, 213 U.S. 1, 8 USPQ 131 (1931); *Ex parte Grayson*, 51 USPQ 413 (Bd. App. 1941).

A claim directed to or including within its scope a human being will not be considered to be patentable subject matter under 35 U.S.C. 101. The grant of a limited, but exclusive property right in a human being is prohibited by the Constitution. Accordingly, it is suggested that any claim directed to a non-plant multicellular organism which would include a human being within its scope include the limitation "non-human" to avoid this ground of rejection. The use of a negative limitation to define the metes and bounds of the claimed subject matter is a permissible form of expression. *In re Wakefield*, 422 F.2d 897, 184 USPQ 636 (CCPA 1970).

Accordingly, the Patent and Trademark Office is now examining claims directed to multicellular living organisms, including animals. To the extent that the claimed subject matter is directed to a non-human "nonnaturally occurring manufacture or composition of matter - a product of human ingenuity" (*Diamond v. Chakrabarty*), such claims will not be rejected under 35 U.S.C. 101 as being directed to nonstatutory subject matter.

Date

4-7-87

  
Donald J. Gulg  
Assistant Secretary and Commissioner  
of Patents and Trademarks

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